

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA,

*Plaintiff,*

v.

CARLOS ADONAY MERINO,

*Defendant.*

Case No.: AGCR245223

STATE'S MOTION FOR CHANGE OF JUDGE

COMES NOW, the State of Iowa, by and through Assistant Polk County Attorney Michael Salvner, and pursuant to Rule 2.11(9) of the Iowa Rules of Criminal Procedure, requests that a new presiding judge be assigned to the above-captioned case and states to the court the following:

This matter is set for trial by jury at 8:00 a.m. on June 22, 2011 in courtroom 101 in front of District Associate Judge Odell McGhee. On June 21, 2011, the Polk County Attorney's Office filed a complaint against Judge McGhee with the Supreme Court Qualifications Committee, and proceedings related to such complaint are currently pending.

Recusal of a judge is mandatory if "the judge's impartiality might reasonably be questioned." Iowa Code of Judicial Conduct, Rule 51:2.11. The Iowa Supreme Court has noted that this is an objective test. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) ("[t]he test is not whether the judge self-questions his own impartiality, but whether a reasonable person would question it. Thus, an objective test is substituted for a purely subjective one.") (citing *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1052 (5th Cir.1975)).

While the judge is an adverse party to the Polk County Attorney's Office in the ongoing proceedings by the qualifications committee, his impartiality is reasonably questioned in cases to which the Polk County Attorney's Office represents a party.

WHEREFORE, the State respectfully requests that a new presiding judge be assigned for trial in the above-captioned case.

VERIFICATION

Upon oath, the undersigned do say and depose that the foregoing statements are true and correct to the best of our Knowledge, Information and Belief.

Respectfully Submitted,

John P. Sarcone, Polk County Attorney

By:

Michael Salvner  
Michael Salvner, AT0006946  
Assistant Polk County Attorney

By:

Ray Blase  
Ray Blase, AT0000903  
Assistant Polk County Attorney

Michael Salvner

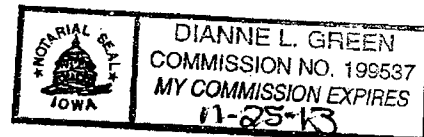
Subscribed and sworn before me by Ray Blase on this 22 day of June, 2011.

Dianne L. Green

Notary Public in and for the State of Iowa

Original filed.

cc: ConGarry Williams, ATTORNEY FOR DEFENDANT



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**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

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<b>STATE OF IOWA,</b>	*	
<b>Plaintiff,</b>	*	<b>Case No. AG245223</b>
<b>vs.</b>	*	
<b>JUAN JOSE MERINO AGUILLAR,*</b>		<b>JURY TRIAL</b>
<b>Defendant.</b>	*	

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**This matter came on for trial on the 22nd day of June, 2011, before the Honorable Odell G. McGhee II at the Polk County Courthouse, Des Moines, Iowa with counsel and Defendant present.**

**A P P E A R A N C E S**

**RAYMOND BLASE & MICHAEL SALVNER, Assistant Polk County Attorneys, Midland Financial Building, Des Moines, Iowa, appearing on behalf of the State.**

**CONGARRY WILLIAMS, Assistant Juvenile Public Defender, 505 Fifth Avenue, Insurance Exchange Bldg., Des Moines, Iowa, appearing on behalf of the Defendant.**

**KATHY A. FORBES  
Certified Shorthand Reporter  
Polk County Courthouse, Room 202C  
Des Moines, IA 50309**

**P R O C E E D I N G S**

(The trial commenced on June 22, 2011, at 8:55 a.m. with the Court, counsel, interpreters and Defendant present.)

(This is a partial transcript of the proceedings.)

**MR. BLASE:** Your Honor, I've just handed you a motion that the State has filed this morning. It's the State's request for a change of Judge. I know that the Court has--

**THE INTERPRETER:** The interpreter did not hear.

**MR. BLASE:** Request for a change of Judge. Yesterday, on June 21, 2011, the Polk County Attorney's Office filed a complaint against Judge McGhee, yourself, Judge, with the Supreme Court Qualifications Committee. As a result of that, I know you're not aware of this and that you're probably just hearing about it now at this moment, but due to that situation and while the case is pending the State is asking that pursuant to Judicial Conduct Rule 51.2(11) as well as--

**THE INTERPRETER:** The Defendant does not hear, so we need to change the battery. Sorry.

**MR. BLASE:** --Iowa Rule of Criminal Procedure 2.11(b), we're requesting that there might be--impartiality might be reasonably questioned on this due to the State being an adverse party to the Judge specifically during this process, so we'd ask the Court to recuse himself at this

1 time and ask the Chief Judge appoint a new Judge to hear  
2 this case.

3 THE COURT: Well, I can see no basis for this  
4 Court recusing itself in this case. If you file a complaint,  
5 you file a complaint. There are many complaints filed  
6 against Judges in the State of Iowa and they continue to  
7 serve in their capacity. We don't know anything about this  
8 case, and wholly in truth I can see no prejudice against the  
9 County Attorney's Office because all you do is present the  
10 case. Unless you can indicate or suggest why I would be  
11 prejudice against you, you're trying the case, and from my  
12 perspective there is no prejudice, and I see no basis for  
13 recusing myself.

14 MR. BLASE: Your Honor, I understand and  
15 respect the Court's ruling. There was some earlier  
16 discussions with the Chief Judge about what if the Court  
17 found that there was no prejudice. We've been instructed  
18 that the remedy at this point is to continue the trial and that  
19 we would have to make an application for review to the  
20 Supreme Court.

21 THE COURT: Denied. Anything else?

22 MR. BLASE: Yes, Judge, explain for us why you  
23 would deny our request for a continuance within speedy  
24 trial?

25 THE COURT: Because the trial is set for trial

1 today and it will be going. You can make your whatever you  
2 want to make in the future. There is no basis to continue  
3 the trial.

4 MR. BLASE: Your Honor, the State is ready to  
5 proceed, and the issue at this point is if there is any  
6 personal or possible prejudice between the Judge and the  
7 County Attorney. The State is entitled to a fair trial as well,  
8 and there just is the appearance that we're now adverse  
9 parties in the matter, and that it just doesn't even appear  
10 appropriate for the Court to hear this case.

11 THE COURT: I will consult with the Chief Judge,  
12 and if it's his belief that I should otherwise be removed  
13 from the case, then he will remove me, but I will not recuse  
14 myself nor will I grant a continuance.

15 MR. BLASE: Well, then, your Honor, I guess  
16 maybe we should take a recess for the Court to consult the  
17 Chief Judge.

18 THE COURT: I mean I don't even know what your  
19 argument is in terms of whatever you've made to the Court.  
20 I have no reason to be prejudice against you because I  
21 don't know what you've argued. I've tried County Attorney  
22 cases for the last six months, and unless there is  
23 something specific that you can outline as to why I would be  
24 prejudice against you in this matter, I have no prejudice. I  
25 mean we, as the Court and parties, disagree all the time,

1       so I don't see any basis for it.

2               **MR. BLASE:** Well, Judge, we could--if it pleases  
3       the Court, we could make the complaint part of this record,  
4       but then that would make the confidential nature of the  
5       complaint part of the public record, and we'd prefer not to  
6       do that. We'd prefer to respect the confidentiality  
7       provisions that are set out in the procedures for  
8       addressing these kinds of issues.

9               **THE COURT:** I understand. And as I said, since I  
10      have no basis to be prejudice against you, I have no basis  
11      in fact.

12              **MR. BLASE:** Would the Court like to review a copy  
13      of the complaint in camera?

14              **THE COURT:** That's up to you. I will go ahead and  
15      consult with the Chief Judge and see if he has any thoughts  
16      on this matter, and if he removes me from the case, that  
17      will be the case. But like I said, I will not remove myself  
18      from the case nor will I grant a continuance in the case.  
19      The case will be proceeding today.

20              **MR. BLASE:** And like I said, I understand and  
21      respect the Court's ruling. Our main concern is the Chief  
22      Judge told us our only remedy is to appeal to the Supreme  
23      Court which would include having to continue the case.

24              **THE COURT:** Well, I think there's maybe a  
25      problem here because you did not bring this to the attention

1 of the Court. I did not know. The Court has not been  
2 consulted about it. Unless, of course, you feel there is  
3 some issue in this case that--I mean I don't know what the  
4 basis for it is. Unless you feel there was some issue in  
5 this case, specifically that there will be a problem with me  
6 going forward with the case. Is there an issue with me  
7 going forward with this case?

8 MR. BLASE: We question the impartiality based on  
9 prior conduct that's outlined in the complaint that we filed  
10 with the Judicial Qualifications Committee. I filed that  
11 complaint on behalf of the office yesterday afternoon about  
12 3:45 at the State Court Administration Office. I want to  
13 make that part of the record.

14 THE COURT: Well, what I'm saying is that had it  
15 not been brought to the attention of the Court, there was no  
16 way for the Court to know there was a complaint filed, and  
17 if you're saying the basis for me recusing myself is either  
18 you think that I am genuinely prejudice against the County  
19 Attorney, is that what you're saying?

20 MR. BLASE: Yes.

21 THE COURT: Well, that means I can't hear any  
22 County Attorney cases.

23 MR. BLASE: We intend to file these motions in  
24 every case in which you are the presiding Judge until  
25 there's some resolution to the complaint or some



1 administrative order.

2 THE COURT: I will deny them then. But I will go  
3 ahead and consult with the Chief Judge to see what he  
4 should say, but at this point prepare to go to trial, and  
5 you've made your record and it will stand, but that's it. We  
6 will be going forward until I'm otherwise removed by higher  
7 authority.

8 (A recess was taken.)

9 THE COURT: We're back on the record outside  
10 the presence of the jury. The State has made a motion for  
11 change of Judge. I've had an opportunity to consult with  
12 the Chief Judge of this district, and seemingly he outlined to  
13 me that it is my decision, and I've made my decision. We  
14 will go forward. I do not believe that the State is capable of  
15 establishing prejudice against their attorneys, and I think  
16 that it will have to stand on its own specifically in reference  
17 to any specific case. You do have a better understanding  
18 of this case. Of course, you do have a right to appeal or  
19 whatever, but at this point I do not think that you are in a  
20 position or capable of establishing that this Court is  
21 prejudice against the County Attorney's Office. And so from  
22 my perspective we will be going forward, and we  
23 understand your complaint.

24 MR. BLASE: Pardon me.

25 THE COURT: I understand the complaint that you

1 have made or whatever, but there is no basis unless you  
2 can point to specific acts that you perceive them that I will  
3 be prejudice in this case and that I think that has any  
4 relevance in this matter. Is there anything else you want to  
5 say?

6 MR. BLASE: Not on behalf of the State, your  
7 Honor.

8 THE COURT: Then we're done and we're going  
9 forward.

10 MR. BLASE: Thank you.

11 (The trial continued.)

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IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

STATE OF IOWA  
PLAINTIFF,

vs.

Tracy Shendahl,  
DEFENDANT.

2011 APR 11 PM 2:44

CASE NO. OM71099

ORDER ON MOTION TO SUPPRESS

This matter came before Judge Odell McGhee for hearing on March 25, 2011. The Parties were present and represented by counsels: Lindholm for the defendant and Porter for the State of Iowa. Evidence was presented and the Court made Findings of Fact which established that Officer Chad Valline of the Ankeny Police Department on December 30, 2010 during implied consent after an OWI stop, told the defendant that "since her prior OWI was deferred, the current charge would only be considered a first offense criminally". This is not a factual interpretation of Iowa law, since any additional arrest after an OWI 1<sup>st</sup> conviction is considered a 2<sup>nd</sup> by Iowa law unless it is excluded by statute, which is not the case here.

The defendant argued that this misinformation was coerced, violated her due process rights and Iowa Code Section 321J.8, because it was an offer of legal advice.

For a driver's consent to a chemical test to be valid, it must be voluntary and uncoerced, and when coercion is alleged, the state must prove by preponderance of the evidence the absence of undue pressure or duress. *State v. Gravenish*, 511 N.W.2d

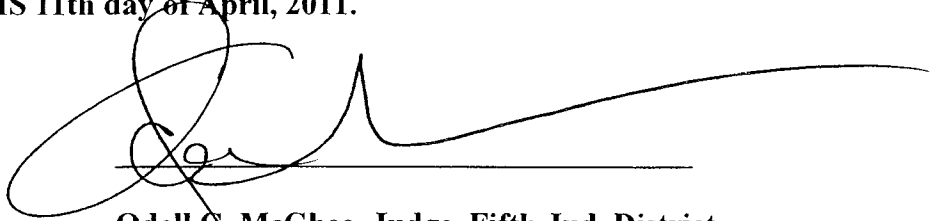
379 (Iowa 1994). The Court will determine if official conduct is coercive and if it is voluntary based on evidence presented at the hearing or trial by looking at the totality of the circumstances to make its determination. *Gravenish, Supra*. The tape of the implied consent fully established that the Officer gave misinformation to the defendant. It does not seem to be coercive since the Officer simply misinterpreted the law in relation to OWI and the effect of a deferred. It did not appear to be fraudulent or intentionally deceptive.

Further a driver's consent to chemical testing, under implied consent, maybe considered involuntary, and therefore invalid, if it is coerced or if the driver is not reasonably informed. *State v. Garcia, 756 N.W.2d 216 (Iowa 2010)*. As stated this Court finds that the Officer did not intentionally mislead the defendant. However he misadvised her on the ramifications of the results from taking the test. This misinformation fully established that the defendant was not reasonably informed of the consequences of taking the test, and that this misinformation was an important consideration in making a decision on taking it. Inaccurate information on implied consent warnings make the information not knowingly and intelligently given. Defendant states that this information vastly affected her determination to take the test. The Court does was not convinced by a preponderance of the evidence that the statement was not a major factor in the defendant's decision. *State v. Garcia, Supra*.

This Court therefore finds that the solicited evidence was an important factor in the defendant's decision to consent to implied consent and therefore the tests are invalid and should be suppressed.

It is **HEREBY ORDERED** that all information concerning the imposition of the Implied Consent and information obtained there from is hereby **SUPPRESSED** as requested by the defendant.

**SO ORDERED THIS 11th day of April, 2011.**



Odell G. McGhee, Judge, Fifth Jud. District

Def, Attys., Polk County Attorney's Office

sg. 4/18/11

✓ Carol Moore  
✓ Matt Lindholm fax 244-2914  
✓ PCAO Daniel Porter  
Brendan Greener

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA, Plaintiff,	CASE NO. OM – 71099
Vs.	STATE'S MOTION TO RECONSIDER DEFENDANT'S MOTION TO SUPPRESS
TRACY SHELDAHL, Defendant	

COMES NOW David Porter as an Assistant Polk County Attorney, and in and on the name of and by the authority of the State of Iowa, hereby respectfully submits the following Motion to Reconsider Defendant's Motion to Suppress. In support thereof, David Porter provides as follows:

1. On or about the March 28, 2010 the court granted Defendant's Motion to

Suppress. As part of the Court's "findings of fact" it stated in part:

"...he misadvised her on the ramifications of the results from taking the test. This misinformation fully establishes that the defendant was not reasonably informed of the consequences of taking the test, and that this information was n an important consideration in making a decision on taking it. Inaccurate information on implied consent warnings make the information not knowingly and intelligently given. Defendant states that this information vastly affected her determination to take the test."

2. These "findings of fact" are a *wholesale departure* from the

established on March 25, 2011. Specifically, the record is void of

that would even remotely support the court's "findings of fact."

3. Moreover, as it relates to the court's conclusion of law, the

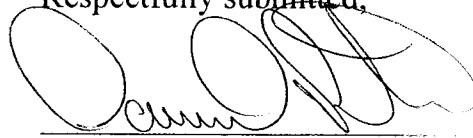
discussion of the issue of promissory leniency, *the central*

*Defendant's Motion to Suppress.*

4. Had there been an analysis of that central issue the Court may have reached a different conclusion.

WHEREFORE, the State of Iowa respectfully requests that, in the interest of justice, the Court reconsider the prior ruling on Defendant's Motion to Suppress.

Respectfully submitted,



David Porter AT - 0000269  
Assistant Polk County Attorney  
206 6th Avenue -Midland Building  
Des Moines, Iowa 50309  
(515)323-5399 - Telephone  
(515) 323-5251 - Facsimile

Original filed

Copies to:

Matthew T. Lindholm  
303 Locust Street, Suite 200  
Des Moines, Iowa 50309  
Phone: 515 – 226 – 0500  
FAX: 515 – 245 – 3850  
COUNSEL FOR DEFENDANT

**CERTIFICATE OF SERVICE**

The undersigned certifies the foregoing instrument was served on all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on April 26, 2010.

By:	<input type="checkbox"/> U.S. Mail	<input checked="" type="checkbox"/> Fax
	<input type="checkbox"/> Hand Delivered	<input type="checkbox"/> Overnight
	<input type="checkbox"/> Certified Mail	<input type="checkbox"/> Other

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

STATE OF IOWA,  
Plaintiff  
Vs

Tracy Shendahl,  
Defendant

CASE NO. OM71099

ORDER ON PLAINTIFF'S MOTION TO  
RECONSIDER THE COURT RULING  
ON DEFENDANT'S MOTION TO  
SUPPRESS

This matter came before Judge Odell McGhee on April 26, 2011 after the Plaintiff filed a Motion to Reconsider the Defendant's Motion to Suppress. The prosecutor had made oral Motions but was told by the Court that it would only be considered if he filed a written request. The Parties are represented by counsel: Lindholm for the Defendant and Porter for the State of Iowa.

Evidence was presented and the Court made Findings of Fact which established that Officer Chad Valline of the Ankeny Police Department on December 30, 2010 during implied consent after an OWI stop, told the defendant that "since her prior OWI was deferred, the current charge would only be considered a first offense criminally". This is not a factual interpretation of Iowa law, since any additional arrest after an OWI 1<sup>st</sup> conviction is considered a 2<sup>nd</sup> by Iowa law unless it is excluded by statute, which is not the case here.

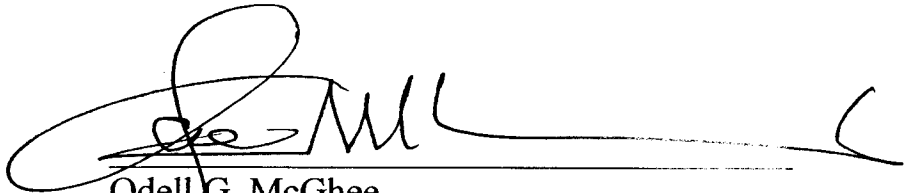
Plaintiff in its Motion states that the Court's Findings of Facts are a "wholesale departure" from the record and further that its Conclusion of Law did not discuss something that is called "promissory leniency" which, according to the Plaintiff, was the central issue in Defendant's Motion. Then so be it. The Court



fully decided the effect of the Police Officer misstatement and its effect on the Defendant. The Court stands by its reasoning and ruling.

The Plaintiff's Motion to Reconsider is "                    " denied.  
(left blank intentionally)

SO ORDERED THIS 29<sup>TH</sup> DAY OF APRIL, 2011.



Odell G. McGhee  
Judge, Fifth Judicial District

Copies to:

Polk County Attorney's Office, D Porter

Defense Attorney, M Lindholm

Defendant

4/29/11  
m

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